Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The
Supreme Court Of The United States

OCTOBER TERM, 1978

NO. 78-1380

WILLIE J. PEARY, A/K/A
WILLIE J. PEAY, Petitioner

v.

STATE OF CONNECTICUT,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RESPONDENT
State of Connecticut

RICHARD L. SHIFFRIN
Assistant State's Attorney
Office of the Chief State's Attorney

I.

STATEMENT OF THE CASE

The respondent does not contest the statement of the case as set forth in the brief of the petitioner other than to point out that the citation to the opinion of the Connecticut Supreme Court in the case at bar is incorrect. The correct citation is *State v. Peary*, 40 Conn. L.J. 13, September 26, 1978.

II.

ARGUMENT

THE PETITION FAILS TO RAISE A FEDERAL QUESTION OF SUBSTANCE.

Petitioner's claim is premised on the alleged impropriety of admitting into evidence a "mug shot" of the defendant. Although, the petitioner asserts that the admission of this evidence was in contravention of his Fifth and Fourteenth Amendment rights, such is not the case. *United States v. Harrington*, 490 F.2d 487 (2nd Cir. 1973) relied on by the petitioner does not establish a Federal Constitutional principle but rather promulgated an evidentiary rule for use by the federal courts in the Second Circuit. Indeed, a more recent Court of Appeals decision treating this question turns on the propriety of introducing a "mug shot" under Fed. R. Evid. 404(5) *United States v. Fosher*, 568 F.2d 207 (1st Cir. 1978).

The petitioner's reliance upon *Ralls v. Manson*,

375 F. Supp. 1271 (D. Conn. 1974) is also misplaced. Firstly, the collateral attack upon the conviction in Federal District Court did not reverse the decision of the Supreme Court of Connecticut in *State v. Ralls*, 167 Conn. 408, 356 F.2d 147 (1974). Even a successful petition for habeas corpus does not reverse the decision of a state court.

Secondly, *Ralls v. Manson*, supra, was reversed in *Ralls v. Manson*, 503 F.2d 491 (2nd Cir. 1974). While the reversal was based on grounds other than the "mug shot" issue, (actually a fingerprint card) Judge Lombard in a particularly limpid concurring opinion summarily disposed of this question (p. 497). Observing that even if introduction of the "evidence" violated the guidelines set out in *United States v. Harrington*, supra, p. 494, such a procedure did not violate the petitioner's right to a fair trial as guaranteed by the due process clause. Judge Lombard went on to express his disapproval of the district court's opinion in light of *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 653-654, 17 L.Ed.2d 606 (1967). His conclusion and reasoning are not inapposite to the case at bar. This court does not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 2013, 32 L.Ed.2d 530 (1972).

The respondent would also contend that the decision of the Connecticut Supreme Court in the instant case is in accord with those of a number of other jurisdictions. Generally, "mug shots" are admissible if the objectionable parts of the photographs which contain police data are masked and they are admitted for the purpose of showing how

the defendant could have been accurately identified from them and not merely for the purpose of prejudicing the jury by showing prior unrelated encounters with the police. See: *Houston v. State*, 360 So.2d 468, 469 (Fla. 3d Dist. 1978); *State v. Futrell*, 565 S.W.2d 465, 467 (Mo. App. 1978); *People v. Aponte*, 45 Ill. App.3d 1030, 360 N.E.2d 424 (1977). This criteria is to the same effect as that relied upon by the Connecticut Supreme Court: "a 'mug shot' is admissible if it is relevant and material and if its probative value outweighs its prejudicial effect." *State v. Peary*, supra. A similar balancing test was approved of in *United States v. Fosher*, supra, p. 213 and *United States v. Watts*, 532 F.2d 1215, 1217 (8th Cir. 1976).

III.

CONCLUSION

The decision of the Connecticut Supreme Court does not contravene any substantive rights of the petitioner. His claim does not rise to constitutional dimensions and thus it is respectfully requested that the petition be denied. *Duncan v. Tennessee*, 405 U.S. 127, 92 S.Ct. 785, 31 L.Ed.2d 86 (1972).

Respondent, State of Connecticut

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